In the Supreme Court of the United States.

OCTOBER TERM, 1922.

OMNIA COMMERCIAL COMPANY, INC., appellant,
v.
THE UNITED STATES.

No. 229.

APPEAL FROM THE COURT OF CLAIMS.

BRIEF FOR THE UNITED STATES.

STATEMENT.

This case is here on appeal from a judgment of the Court of Claims dismissing appellant's petition on a demurrer challenging the sufficiency of the petition to state a cause of action against the United States. (R. 22; Op. Ct. Cl., R. 21–22.)

The salient facts set forth in the petition and relied upon as a basis for the claim asserted are these:

By virtue of an assignment of a contract the Omnia Commercial Company acquired the right to purchase from the Allegheny Steel Company 18,000 tons of steel ship plate at 6¼ cents per pound, to be delivered during the year 1918. (R. 3.) This right was con-

firmed by a direct contract between the two companies, executed August 23, 1917. (R. 3; Ex. VI, R. 15.)

On the day that it took this assignment, May 19, 1917, the Omnia Commercial Company contracted for the sale of this steel to the Vulcan Steel Products Company at $9.25 per cwt. (R. 3, 4; Ex. VII, R. 18.)

Thereafter, the Director of Steel Supply of the War Industries Board of the United States government notified the Allegheny Company that the United States required for public use the steel plate production capacity of that company, and, notwithstanding knowledge of that company's contract with the Omnia Company, refused to permit the carrying out of the contract, and threatened to confiscate the steel company's plant if it attempted to fulfill the same. (R. 4, 5.)

The theory of the petition is that by its action through the Director of Steel Supplies the United States took the property of the Omnia Company without due process of law in violation of the Fifth Amendment, the loss to the company thereby accruing being fixed at $990,000.

ARGUMENT.

Our argument will be divided into two main divisions, indicated by appropriate headings.

Even if the appellant's contractual rights constitute, under the circumstances disclosed, property within the meaning of the Fifth Amendment, the complaint nevertheless fails to state a cause of action, there being no allegation from which it can be determined what statutory authority existed for doing the things complained of.

It is true that §145 [1] of the Judicial Code gives the Court of Claims jurisdiction over claims founded upon the Constitution. But before the United States can be held liable for property taken for public uses by a government official, it must appear that this official had *statutory* authority to take the property. The mere taking of private property for public use is not enough. It is necessary that statutory authority be conferred. Otherwise the official's seizure amounts to nothing more than a tort, even though the property taken is devoted to a public use.

United States v. *North American, etc., Co.*, 253 U. S. 330.

Hooe v. *United States*, 218 U. S. 322.

It is now settled that the mere fact that a claim is founded upon the Constitution does not invest the

[1] "The Court of Claims shall have jurisdiction to hear and determine the following matters: First, all claims (except for pensions) founded upon the Constitution of the United States or any law of Congress, upon any regulation of an Executive Department, upon any contract, express or implied, with the Government of the United States, or for damages, liquidated or unliquidated, in cases not sounding in tort, in respect of which claims the party would be entitled to redress against the United States either in a court of law, equity, or admiralty if the United States were suable," etc.

Court of Claims with jurisdiction. The existence of a contract, either express or implied, is a necessary element.

Basso v. *United States*, 239 U. S. 602.
Hooe v. *United States, supra.*
United States v. *North American, etc., Co., supra.*

Of course a contract to pay will, within certain limits, be implied where property is taken for governmental purposes pursuant to *statutory* authority.

Tempel v. *United States*, 248 U. S. 121.
Horstmann Co. v. *United States*, 257 U. S. 138.
Sutton v. *United States*, 256 U. S. 575.

This brings us to the question whether Replogle, the Director of Steel Supply of the War Industries Board, was invested with authority to do the things alleged. The complaint in substance charges that in September and October, 1917, he told the steel company that the government required its entire production for 1918, and that it must not, for that reason, carry out its contract with the plaintiff. The threat was made that if the steel company disobeyed, its plant would be confiscated. As a result of all this, it is alleged that the plaintiff's property (that is to say, its contractual rights) was taken for public use. Accordingly it is contended that the plaintiff is entitled to invoke the provision of the Fifth Amendment requiring just compensation.

But unless Replogle was in some way authorized by statute to do these things, it is clear, from the cases

just cited, that *his* unauthorized acts imposed no liability on the United States. The army appropriation act of August 29, 1916, provides for a Council of National Defense (39 Stat. 619, 649). This Council, on July 28, 1917, created, with the President's approval, a new board to which it gave the name War Industries Board.[2] This board, however, had only advisory powers.[3] Accordingly it is clear that

[2] The Official Bulletin of July 30, 1917, says: "The Council of National Defense has decided, with the approval of the President, to create a small body to be known as the war industries board. This board, in addition to other duties, will assume those formerly discharged by the general munitions board. The new board will be composed of seven members, working under the direction and control of the Council of National Defense and responsible through it to the President. * * * It will lodge responsibility for effective action as definitely as is possible under existing law."

[3] See "American Industry in the War. A Report of the War Industries Board," by Bernard M. Baruch, Chairman, Government Printing Office, 1921, being a report made to the President on March 3, 1921; "The War Industries Board remained a subordinate body to a council having advisory powers only. As necessities for its action arose, however, it developed and acted, relying on the one hand upon the support of the President, the Secretaries of War and the Navy, and other legally established agencies, and on the other hand upon the voluntary support of the business men of the country. For the most part there was cooperation and cordial good will, but sometimes legally responsible services of the government would be doubtful about their obligation or their right to defer to the determinations of a body possessing only advisory powers. Priority rules were promulgated, prices were fixed, and projects for vast increases in production were inaugurated on voluntary agreements with the industries. Success depended upon the cooperation of other branches of the government. Technically the Board had no administrative powers whatever at this time. It had no legal responsibility" (p. 24).

Again: "Legally, priority orders outside the sphere of transportation were, possibly, no more than requests; in fact, they usually were stated in the form of requests and their issuance was ordinarily in conformance with understandings reached through negotiations with the trade involved; but actually they had all the force and vigor of orders, since every concern affected knew that if it did not comply its supply of fuel might be cut off, its materials and supplies might not be received for transportation; or, its establishment might be seized by the government" (pp. 50-1).

Replogle was not vested with statutory authority to bind the United States.[4]

United States v. *North American, etc., Co., supra.*

One further matter remains to be considered. The complaint, it will be observed, contains, at one place, allegations of what Replogle, as director, etc., did, the allegation being that as a result of what *he* did on behalf of the United States, the latter took the plaintiff's property. Other allegations then follow in which all references to Replogle are avoided. The charge is merely made that the *defendants* did certain things. It is in substance alleged (p. 5) that the *defendants*, well knowing of the plaintiff's contract, continued, throughout 1918, to refuse permission to the steel company to fulfill its contract with plaintiff; and that the *defendants* continued, during 1918, to take the plaintiff's right of priority for public use, etc.

But it is submitted that these are mere *legal* conclusions, which are not admitted but on the contrary are expressly challenged by the demurrer.

These later allegations must be interpreted in the light of the allegations immediately preceding as to what Replogle did. They are not intended

[4] In the Court of Claims the plaintiff apparently argued that Replogle's acts were done under the Act of March 4, 1917 (39 Stat. 1169, 1193), and under the Act of June 15, 1917 (40 Stat. 182, 183). At any rate, we find in the government's brief filed in that court a statement to the effect that these acts are the ones under which the officers of the United States are declared to have proceeded, and that upon them the plaintiff must rest its claim. But whether this statement of the plaintiff's attitude is correct is a mere matter of conjecture. The plaintiff at least fails to apprize us under what statute, if any, Replogle acted. And the appellant in its brief in this court fails to point out the statutory authority on which it relies.

to set forth additional facts as constituting, separate and apart from everything else, an independent ground of recovery. They are merely inserted by way of amplification. The language is that the defendants, well knowing of the plaintiff's contract, *continued* to refuse, etc. The words must be interpreted as meaning that the United States continued, throughout 1918, to refuse permission to the steel company to carry out its contract with plaintiff *because* of what Replogle had done in 1917.

We accordingly submit that the case is not ruled by *Portsmouth, etc., Co.* v. *United States*, decided December 4, 1922. On the contrary, it is ruled by *United States* v. *North American, etc., supra;* and while that case was not decided on a question of pleading, it seems to us that its necessary deductions lead to the conclusion that the complaint now under review is a bad one.

Furthermore, the complaint is bad in that it fails to allege any facts from which even an implied contract to pay can be inferred. If any inference can be drawn from the allegations, it is to the effect that the United States *declined* to recognize that the plaintiff had any rights which the government was bound to respect, thus expressly negativing the theory of an implied contract. Particularly is this true in the light of the rule that a pleading, if ambiguous, is to be taken most strongly against the party who prepares it. The allegation is made that although Replogle well knew of plaintiff's contract, the defendants nevertheless made no offer of compensation; also that

the defendants, though often requested so to do, totally *refused* to pay the plaintiff compensation. This, we submit, is a tacit avowal that the United States refused to make compensation because it conceived that it was under no legal obligation to do so. Under such circumstances there can be no implied contract.

Tempel v. *United States*, *supra*.

Aside from any question whether the complaint is bad in the respects just discussed, it is clear that there was no taking of the appellant's property within the meaning of the Fifth Amendment.

It is manifest that the United States never asserted any right or property under the appellant's contract. It did not demand of the Allegheny Company any performance of any of the terms of the contract for the benefit of the United States. It did not claim to be subrogated to the rights of the appellant in the contract. It did not "take" appellant's contract.

The theory under which appellant presses its claim is that the action of the United States in preventing the fulfillment of the *contract* which appellant had with the Allegheny Company for 18,000 tons of steel plates, and in requisitioning the manufacturing capacity of the latter company, constituted a taking of appellant's property for which it should have compensation.

We assert, however, that the fact that the contract was made unenforceable and incapable of fulfillment

did not give rise to a valid claim against the government.

Every contract such as the one here in question is entered into subject to the possibility that the sovereign may render it unenforceable or impair its value. The power of the sovereign to regulate (especially in war time) industries affected with a public interest must necessarily be unaffected by the existence of contracts entered into prior to such regulations.

L. & N. R. Co. v. *Mottley*, 219 U. S. 467, 480–486.

Union Dry Goods Co. v. *Georgia Pub. Service Corp.*, 248 U. S. 372, 375, 376.

Marcus Brown Co. v. *Feldman*, 256 U. S. 170, 198.

Levy Leasing Co. v. *Siegel*, 258 U. S. 242, 249.

But the impairment of a contract or action making it incapable of fulfillment or enforcement, by legislation of the kind here presented, does not afford any basis for a claim for compensation under the Fifth Amendment. It is not an exercise of the power of eminent domain.

Legal Tender Cases, 12 Wall. 457.

Hamilton v. *Kentucky Distilleries Co.*, 251 U. S. 146.

Jacob Ruppert v. *Caffey*, 251 U. S. 264.

C. B. & Q. Ry. v. *Drainage Com'r.*, 200 U. S. 561.

Atlantic Coast Line v. *Goldsboro*, 232 U. S. 548.

In the *Legal Tender Cases*, 12 Wall. 457, this court, in disposing of the objection that the legal tender Act violated the spirit of the Fifth Amendment, said (p. 551):

> That provision has always been understood as referring only to a direct appropriation, and not to consequential injuries resulting from the exercise of lawful power. It has never been supposed to have any bearing upon, or to inhibit laws that indirectly work harm and loss to individuals. A new tariff, an embargo, a draft, or a war may inevitably bring upon individuals great losses; may, indeed, render valuable property almost valueless. They may destroy the worth of contracts. But whoever supposed that, because of this, a tariff could not be changed, or a nonintercourse act, or an embargo be enacted, or a war be declared? By the Act of June 28, 1834, a new regulation of the weight and value of gold coin was adopted, and about six per cent was taken from the weight of each dollar. The effect of this was that all creditors were subject to a corresponding loss. The debts then due became solvable with six per cent less gold than was required to pay them before. The result was thus precisely what it is contended the legal tender acts worked. But was it ever imagined this was taking private property without compensation or without due process of law?

In *Morrisdale Coal Co.* v. *United States*, decided May 29, 1922, it was held that a coal company whose business during the war was regulated by the govern-

ment was not entitled to recover of the latter for loss which accrued because the interposition of the government prevented it fulfilling contracts for its products whereby it would have received more than it did under sales at the price fixed by the government.

The case at bar is not different in principle. It and the *Morrisdale* case proceed fundamentally upon the proposition that the government prevented the fulfillment of a contract. If the Morrisdale Company could not recover from the government, much less would recovery be possible by this appellant with whom the government had no dealings at all.

The contract, it will be observed, expressly provided for the very contingency that afterwards arose. The appellant made a bargain with the steel company on the express condition that the latter should not be liable if it was disabled from carrying out its contract by reason of governmental seizure or other contingencies beyond its control.[3] Even if these conditions had not been inserted, the law would have read similar ones into the contract.

> 3 Williston on Contracts, §§1935, 1938, 1948, 1951.
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> *The Kronprinzessin Cecelie*, 244 U. S. 12.

We thus have the novel situation of a party endeavoring to fasten liability on the government,

[3] The contract reads: "The seller shall not be liable for any loss or damage caused by fire, differences with employees, accidents, government seizures, embargoes (railroad or otherwise), or stoppages or contingencies beyond its control, and any of such causes shall be sufficient reason or excuse for any delay caused thereby." (R. 16.)

although confessedly unable to recover from the person with whom it contracts.

It is clear that if the steel company's plant had been destroyed by the tortious act of a third party, the appellant would have had no cause of action against the latter.

Byrd v. *English*, 117 Ga. 191.

And even if a third party had induced the steel company not to carry out its contract, no cause of action against that party would have arisen unless the act was *maliciously* done. In other words, if a third party had, without malice, induced the steel company to deliver to him its entire steel production in 1918, the appellant could not have recovered damages against such party, even though the latter had known that the necessary effect of his conduct would be to disable the steel company from carrying out its contract with the appellant.

Angle v. *Chicago, etc., Ry. Co.*, 151 U. S. 1.

Nor would the appellant have any cause of action against third parties if the steel company had been disabled from carrying out its contract by reason of its plant being dynamited and destroyed by such parties to prevent the spread of fire.

Bowditch v. *Boston*, 101 U. S. 16.

And if the town where the steel company's plant is located had entered into a contract with a water company under which the latter was obligated to install hydrants for protection against fire, the failure of the water company to carry out its contract

with the town would have given neither the appellant nor the steel company a right of action against the water company if the steel company's plant had been destroyed by a fire which would have been averted if the hydrants had been installed.

> *German Alliance Ins. Co.* v. *Home Water* Co., 226 U. S. 220.

Much less therefore can it be said that inability on the part of the steel company to fulfill its contract gives the appellant a right, under the Fifth Amendment, to a cause of action against the United States merely because the latter, in the exercise of a concededly lawful war power, makes performance impossible by calling upon the steel company to deliver to it, for war purposes, its entire steel production.

The following cases, it seems to us, support the view that there was no taking within the constitutional sense:

> *Transportation Co.* v. *Chicago*, 99 U. S. 635.
> *Jackson* v. *United States*, 230 U. S. 1.
> *Hughes* v. *United States*, 230 U. S. 24.
> *Peabody* v. *United States*, 231 U. S. 530.
> *Richards* v. *Washington Terminal Co.*, 233 U. S. 546.
> *United States* v. *Cress*, 243 U. S. 316.
> *Bothwell* v. *United States*, 254 U. S. 231.
> *Portsmouth, etc., Co. et al.* v. *United States*, decided December 4, 1922.

Indeed if the appellant's contention is allowed to prevail, it will necessarily follow that if, in the exercise of its admittedly lawful war power (*Selective Draft*

Law Cases, 245 U. S. 366), the United States compulsorily inducts into the military service a person who is bound by contract to render personal services to another for a term of years, thus disabling the person so inducted from carrying out his contract, it must therefore compensate the person to whom the services are owing, as well as the person obligated to render the services, because *contractual* rights have been taken within the meaning of the Fifth Amendment.

But it is said that appellant, pursuant to the requirements of its contract, posted credit for the benefit of the Allegheny Company, as a result of which that company was enabled to purchase large quantities of raw materials which, but for the intervention of the United States, would have been fabricated into the steel plates which it had agreed to deliver to appellant. Upon this premise, a claim is put forth that the United States actually took tangible property of appellant for which no compensation has been made. (R. 5.)

But the contract was for delivery of steel plates. The rule is well established that an agreement for future delivery of articles to be manufactured is an executory contract and title to the finished product does not pass to the buyer until delivery. *Clarkson* v. *Stevens*, 106 U. S. 505, 513–516; *Northwestern State Bank* v. *Silberman*, 154 Fed. (C. C. A.) 809; *Hartley* v. *Lapidus & Holub Co.* 216 Fed. (C. C. A.) 92, 98.

Therefore, no claim is tenable that the steel plates when fabricated belonged to appellant.

Neither does the fact that credits were posted by appellant help it, for that would not create a title in it to the materials. *Clarkson* v. *Stevens, supra.*

It is clear that whatever property was taken belonged to the Allegheny Company, and the government's liability was to that company, not to appellant.

The judgment, it is submitted, should be affirmed.

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